

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Temporary Immediate
Suspension of the License of Pamela
Johnson, 701 – 329th Avenue NE,
Cambridge, MN 55008, to Provide Family
Child Care

**FINDINGS OF FACT, CONCLUSIONS AND
RECOMMENDED DECISION**

The above-matter came on for hearing before Administrative Law Judge George A. Beck commencing at 10:00 a.m. on July 1, 2004 at the City Hall in Cambridge, Minnesota. The OAH record closed on July 1, 2004, at the conclusion of the hearing.

Michael E. Burns, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127 appeared representing Isanti County Family Services and the Department of Human Services. David Spear, Esquire, of the firm of Spear & Swanson, 615 Third Avenue SW, Pine City, MN 55063 appeared representing the Licensee, Pamela Johnson.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will issue a final decision after reviewing the administrative record, and he may adopt, reject or modify the Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this recommended decision in which to file any exceptions to the report with the Commissioner.^[1] Parties should contact the office of Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, 651-296-2701 to find out how to file exceptions. Since the Commissioner must issue his final order within 10 working days from receipt of the Administrative Law Judge's recommended decision,^[2] the parties are requested to file any exceptions as soon as possible.

STATEMENT OF ISSUE

Is there reasonable cause to believe that there is an imminent risk of harm to the health, safety or rights of children in the care of Pamela Johnson so as to require the temporary immediate suspension of her family child care license?

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Pamela Johnson is licensed to provide family child care at her residence at 701 – 329th Avenue NE in Cambridge, MN. She has been licensed to provide child care for approximately 22 years. Prior to her temporary suspension she provided child care for 15 to 16 families. She did not provide child care on weekends or in the evening.

2. In 2000, Ms. Johnson's license was made conditional as a result of an incident in which Nick, her son, who was then age 10, touched a 4 year old daycare girl with his finger underneath her underwear while they were playing "tent" in the living room during daycare hours. As a result of the incident, Ms. Johnson's license was made conditional and Nick was not allowed in the child care home during daycare hours unless there was a second adult present.^[3] Nick was also required to complete a sexual perpetrator group before he was allowed to return to the child care home. He completed the group.

3. Nick moved to reside with his father in Pine City in the spring of 2001. During the 2001-2002 school year while Nick was in the sixth grade and residing with his father, he engaged in nonconsensual sexual contact with three girls in his grade. The contact consisted of touching their breasts and buttocks over their clothing after being told to stop.^[4] As a result, Nick was convicted of the gross misdemeanor of criminal sexual conduct in the fifth degree.^[5]

4. Subsequently, Nick began therapy related to sexual offending with Mark J. Schmitz, a psychologist with the Five County Mental Health Center. The therapy focused on sexual health and responsibility, victim empathy, developing healthy relationships, and relapse prevention.

5. Pine County Social Services contacted Ms. Johnson shortly before April 2, 2004, because it determined that Nick, now age 14, had been left alone for over 24 hours because of his father's job as an over the road trucker. Pine County told Ms. Johnson that Nick could no longer live with his father.

6. In a letter dated April 1, 2004, Mr. Schmitz advised Nick's probation agent that Nick had completed the therapy and that Mr. Schmitz did not have current concerns about Nick residing with his mother, at the daycare residence.^[6]

7. Nick returned to his mother's residence late in the day on April 2, 2004, a Friday. Ms. Johnson was aware that she needed to contact her Licensor with Isanti County because Nick returned home. She unsuccessfully called Isanti County on Monday and Tuesday, April 5th and 6th without leaving a message, and finally left a voicemail for her Licensor, Heidi Grissman on Wednesday, April 7th. Isanti County does have a 24 hour, 7 day a week confidential voicemail system.

8. After April 7th, Isanti County provided forms for a background check and change of household residence to Ms. Johnson and Heidi Grissman picked the forms up from Ms. Johnson on April 22, 2004. At that time, Ms. Johnson advised Ms. Grissman that Nicholas had had a criminal sexual conduct conviction involving his

girlfriend and Ms. Grissman advised her that she would need to seek reconsideration of that disqualification by the Department.

9. Isanti County then collected information from the Pine County Sheriff's Department, the Pine County Court Services and Pine County Social Services as well as from Nick's psychologist. A Risk of Harm Worksheet was completed showing Nick as a high risk and, in consultation with the county attorney's office and the Department of Human Services, Isanti County Family Services decided to recommend a temporary immediate suspension of Ms. Johnson's license.

10. Ms. Grissman sent a letter dated May 10, 2004 to the Department of Human Services reciting the history in this matter and recommending the temporary immediate suspension.^[7] On May 11, 2004, the Human Services Department issued an Order of Temporary Immediate Suspension to Ms. Johnson suspending her license to provide family child care.^[8]

11. Ms. Grissman delivered the Order to Ms. Johnson on the afternoon of May 11, 2004. Ms. Johnson asked her if the suspension could be lifted if Nick was removed from her home. Ms. Grissman said she would check with DHS. Later that afternoon, DHS stated that the suspension would have to remain in effect pending the hearing even if Nick were removed from the home. Ms. Grissman proceeded to advise the parents of Ms. Johnson's daycare children that her license had been suspended.

12. On May 12, 2004, letters to Ms. Johnson and to Nick directing that he be immediately removed from direct contact with persons in the child care program were delivered to Ms. Johnson along with a form to request reconsideration of the disqualification determination. Ms. Johnson filled out the reconsideration form on May 12th, based on information from Nick. In answering questions on the form, Nick stated that his conviction was due to grabbing the chest of his girlfriend and that she got mad one day and told school personnel about it.^[9]

13. When Ms. Grissman visited Ms. Johnson's house on May 11, 2004, she observed that Nick was in the house at one point and then was outside mowing the lawn. Ms. Johnson's husband was also present. Since Nick had returned home, Ms. Johnson observed the restrictions of the earlier conditional license by making sure that a second adult was present if Nick was in the home during daycare hours.

14. On May 21, 2004, Ms. Johnson provided a letter to Ms. Grissman from her 24 year old daughter, Sonja, stating that Sonja would be happy to have Nick stay in her home during her mother's daycare hours.^[10] Sonja lives approximately two miles from her mother.

15. Ms. Johnson appealed the suspension by the Department and the hearing was tentatively scheduled for June 2004. However, on June 2, 2004, the Isanti County Attorney's Office advised Ms. Grissman that it was declining to represent the Department of Human Services in this matter. An Assistant County Attorney, stated that he was declining representation because "it would not serve justice with the facts I have before me."^[11] The Assistant County Attorney advised Ms. Grissman that he wasn't willing to continue to prosecute the matter if Nick moved out of the home.

16. On June 2, 2004, the request for reconsideration of the disqualifier was denied by the Department on the grounds that it had been a short amount of time since Nick completed his therapy and in light of the prior incidents, it was too soon to determine that he would not offend again.^[12]

17. Nick has continued in counseling with Mr. Schmitz, although he has completed his probation. Mr. Schmitz states that Nick has been successful in counseling and he believes that Nick is not a risk for younger children at present and that it is appropriate for Nick to live with his mother.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter under Minnesota law.^[13]

2. The Department of Human Services and Isanti County gave proper and timely notice of the hearing and have fulfilled all procedural requirements of law and rule.

3. Under Minnesota law, if a "license holder's action or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program, the Commissioner shall act immediately to temporarily suspend the license."^[14]

4. At a hearing appealing an Order of Temporary Immediate Suspension, the burden of proof on the Department is to demonstrate that "reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program."^[15] The Department is authorized to demonstrate reasonable cause by submitting statements, reports or affidavits.^[16]

5. The Administrative Law Judge is directed by statute to determine "whether the immediate suspension should remain in effect pending the Commissioner's final order... regarding a final licensing sanction."^[17]

6. The Department and the County have demonstrated reasonable cause to believe that there is a risk of imminent harm to the health or safety of children served by the Licensee.

7. The Memorandum that follows explains the reasons for these conclusions.

Based upon these Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Order of Temporary Immediate Suspension suspending the family child care license of Pamela Johnson be AFFIRMED.

Dated this 9th day of August, 2004

/s/ George A. Beck

GEORGE A. BECK
Administrative Law Judge

Reported: Tape Recorded
(Two Tapes) No Transcript Prepared.

MEMORANDUM

In a proceeding to temporarily suspend a child care license, the Department only has to show that *reasonable cause* exists to believe the Licensee failed to comply with the law. The legislature presumably established a low threshold for this determination to assure that children will be safe until there can be a full hearing on whether or not the child care license should be permanently revoked or otherwise subject to discipline.

A finding of “reasonable cause to believe” in a child care license proceeding has been compared to a finding of “probable cause” in a criminal proceeding.^[18] Probable cause has commonly been defined to mean “a reasonable ground in fact and circumstance for belief in the existence of certain circumstances.”^[19] In both cases the state is entitled to rely on hearsay evidence. Unless the Licensee presents evidence that makes the alleged violation “inherently incredible,” or “seemingly impossible under the circumstances,” evidence offered by the Licensee will not overcome a probable cause determination.^[20] The statute specifically allows the Department to demonstrate reasonable cause by submitting “statements, reports, or affidavits.”

The Licensee argues that the Department has failed to show reasonable cause to believe that there is an imminent risk of harm to the safety of children in her care. She points out that Mr. Schmitz does not have a concern about Nick residing with her. She argues that she promptly reported Nick’s return to her home and asserts that she did not know the details of Nick’s conviction until late April and could not provide the details to the County earlier. She states that she is willing to have Nick stay with his sister during daycare hours.

The Department suggests that the 2000 daycare incident along with the 2002 criminal sexual conduct conviction are cause for serious concern. It points out that Ms. Johnson did not leave a voice-mail about Nick until April 7, five days after his return, and did not advise Ms. Grissman of the conviction until April 22nd. It is also concerned

that if Nick is sleeping at his mother's house and staying with his sister during the weekdays, that he could easily return to his mother's house during daycare hours.

The Department has met its burden to show reasonable cause to believe there is an imminent risk. With sexual misconduct incidents in 2000 (at the daycare) and 2002 it seems clear that Nick cannot reside in a child care home, even though he has completed a course of therapy. Mr. Schmitz's opinion, while helpful, does not take into consideration the law regulating child care licenses. If Ms. Johnson's proposal were accepted, Nick would still reside with his mother, but would be two miles away during weekdays. There is a reasonable likelihood that Nick, a 14 year old, would return home during child care hours under such a scenario. Although the Licensee describes this possibility as speculative, it is likely enough to constitute reasonable cause. This factor, coupled with the delay by Ms. Johnson in reporting Nick's return and her failure to disclose his conviction on April 7th, justify the temporary suspension, pending a fuller exploration of the facts at a future disciplinary hearing, if necessary.

G.A.B.

^[1] Minn. Stat. § 245A.07, subd. 2a(b).

^[2] Minn. Stat. § 14.61.

^[3] Exhibit 5.

^[4] Exhibit 8.

^[5] Exhibit 7.

^[6] Exhibit B.

^[7] Exhibit 1.

^[8] Exhibit 2.

^[9] Exhibit 9.

^[10] Exhibit C, Exhibit D.

^[11] Exhibit A

^[12] Exhibit 11.

^[13] Minn. Stat. § 245A.01 – 245A.16 and 14.50.

^[14] Minn. Stat. § 245A.07, subd. 2.

^[15] Minn. Stat. § 245A.07, subd. 2a(a).

^[16] Minn. Stat. § 245A.08, subd. 3.

^[17] Minn. Stat. § 245A.07, subd. 2a(c).

^[18] State v. Florence, 239 N.W.2d 892, 902 (Minn. 1976).

^[19] Merriam Webster Dictionary of Law (1996).

^[20] State v. Florence, 239 N.W.2d at 903.